BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN H. SHERRILL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,823
HORIZON TRANSPORT, INC.	)	
Respondent	)	
AND	)	
	)	
INSURANCE CARRIER UNKNOWN	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 23, 2008, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

This is a claim for a November 29, 2006, accident that occurred in Oregon. At the April 2008 preliminary hearing, respondent raised three defenses: claimant was not an employee of respondent at the time of the accident; the Kansas Workers Compensation Act does not apply to this accident; and claimant failed to provide respondent with timely written claim.

In the April 23, 2008, Order, Judge Hursh denied claimant's request for benefits. The Judge found claimant was not an employee of respondent. Moreover, the Judge found the Kansas Workers Compensation Act did not apply as the parties' contract of employment was not formed in Kansas, claimant's accident did not occur in Kansas, and Kansas was not claimant's principal place of employment. The Judge wrote in pertinent part:

> In this case, there were a number of facts indicative of an independent contractor relationship. The employment application specified that it was for "independent contractor driver services" and a written employment contract identified the claimant as a contractor. The claimant was responsible for fueling and maintaining his truck. The claimant was able to select his own hauling jobs from an on-line list that specified the pay for each job. He was not required to accept any particular job.

> A few factors were suggestive of an employer-employee relationship. The respondent specified the date and time by when the load must be delivered. The respondent provided a driving route for each job, and on certain jobs the driver was required to follow the predetermined route in order to obtain monetary incentives passed down from the client. While under the lease agreement, the claimant could not use his truck to haul for any other company, and his truck carried signage for the respondent company. However, this lease agreement was not for any specified term, apparently terminable at will by either party.
>
> Considering the whole record it is held that the claimant's employment was more in the nature of an independent contractor than an employee of the respondent.
>
> Furthermore, the last act to complete the employment agreement, the respondent's acceptance of the claimant's application, occurred by a phone conversation initiated by the respondent from its Indiana location. The contract of employment was not completed in Kansas, the accident did not occur in Kansas, and Kansas was not the claimant's principal place of employment. The Kansas workers compensation act would not apply to this case according to K.S.A. 44-506.[1]

Claimant contends he was an employee of respondent. Claimant argues his contract of employment was made in Kansas and that he was principally employed in Kansas pursuant to K.S.A. 44-506. Accordingly, claimant requests the Board to reverse the April 23, 2008, Order. Respondent requests the Board to affirm the Order.

The only issues before the Board on this appeal are:

1. Does claimant's accident fall within the jurisdiction of the Kansas Workers Compensation Act?

2. If so, did respondent hire claimant as an employee or an independent contractor for purposes of the Act?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

Respondent delivers travel trailers, recreational vehicles, and motor homes across the United States and Canada. On November 29, 2006, claimant was injured in a vehicle accident while pulling a trailer for respondent. There is no question that claimant's accident arose out of and in the course of the work he performed for respondent. But because the

[1] ALJ Order (Apr. 23, 2008) at 2.

accident occurred in Oregon, there is a question whether this accident falls within the jurisdiction of the Kansas Workers Compensation Act and whether claimant was an employee of respondent.

Claimant, who lives in Galena, Kansas, began working for respondent in July 2004 after forwarding an employment application to respondent in Indiana and later traveling to Indiana for an interview, driving tests, and orientation. The employment application, which was entitled Driver's Application to Provide Independent Contractor Driver Services, was completed by claimant on June 17, 2004. After receiving claimant's application and performing a preliminary review, respondent contacted claimant at his home by telephone and requested him to obtain a motor vehicle report, take a pre-employment drug screen, and have his truck inspected. Claimant complied and forwarded the requested information to respondent.

According to claimant, respondent telephoned him after the company received the requested information and told him he was hired. Claimant then traveled to respondent's place of business in Indiana, where respondent gave him a driving test, tested his ability to hitch a trailer, and interviewed him. In Indiana, the parties also executed a lease agreement for claimant's truck and the contract of employment. The latter contract included a specific provision that claimant was an independent contractor.

The undersigned Board Member finds claimant has failed to prove his employment contract with respondent was formed in Kansas.

The undersigned also finds claimant has failed to prove that his principal place of employment with respondent was in Kansas. The records introduced at the preliminary hearing show where claimant made pickups and deliveries from July 15, 2004, through November 17, 2006. Out of the 121 entries for that period, claimant made only two pickups and one delivery in Kansas.

CONCLUSIONS OF LAW

When an accident occurs outside the state of Kansas, either the contract of employment had to be formed within the state or the state must be the worker's principal place of employment before the Kansas Workers Compensation Act applies to the accident and resulting injury. K.S.A. 44-506 provides:

> The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged: *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment

> is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: *Provided, however*, That the workmen's compensation act shall apply to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of the state of Kansas and to all projects, buildings, constructions, improvements and property belonging to the United States of America within said exterior boundaries as authorized by 40 U.S.C. 290, enacted June 25, 1936.

But none of the factual circumstances designated in the statute exist in this case. Therefore, K.S.A. 44-506 is not applicable.

There is no question that claimant's November 2006 accident occurred outside the state of Kansas. Likewise, there is little question that Kansas was not claimant's principal place of employment as most of claimant's pickups and deliveries were in other states. Finally, claimant failed to prove his contract of employment with respondent was formed in Kansas. According to claimant, he received a telephone call from respondent that it had accepted his application for a job. Under that scenario, respondent's act of accepting claimant's application or offer of employment, which was made from respondent's offices in Indiana, would have been the last act necessary to form the contract between claimant and respondent.

> The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974).[2]

Furthermore, assuming the contract of employment was not formed until claimant traveled to respondent's office to complete his driving test and interview and to execute the written contract between the parties, the last act in forming the contract occurred in Indiana. Consequently, under either scenario the Kansas Workers Compensation Act does not apply.

In short, the undersigned affirms the Judge's finding and conclusion that claimant has failed to prove the Kansas Workers Compensation Act applies to his November 2006 accident. The issue whether claimant worked for respondent as an employee or as an independent contractor is rendered moot and need not be further addressed.

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[2] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, for the reasons above the undersigned affirms the April 23, 2008, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge

[3] K.S.A. 44-534a.